NO. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

SUPPLEMENTAL BRIEF FOR APPELLEE

We have received opinions in two recent cases which were not available to us at the time of the preparation of our brief in chief and which we would like to call to the attention of the Court.

In *City of Seattle v. Hill*[1] the Supreme Court of Washington held that an ordinance prohibiting public drunkenness was valid as applied to a chronic alcoholic. Psychiatric testimony in the case was supplied by a Dr. Pattison, a member of the staff of the University of Washington Medical School, apparently called by the defense:

> "Dr. Edward M. Pattison, eminently qualified specialist in psychiatry and the treatment of alcoholism, while emphasizing the inability of an alcoholic to stop drinking *once he had started,* said that the persons so afflicted typically remained sober for periods of 6 to 8 months voluntarily but eventually returned to their drinking.'"[2]

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[1] ——Wash.2d ——, 435 P.2d 692 (Dec. 21, 1967).

[2] 435 P.2d at 696 (emphasis supplied).

The witness attributed the return to drinking after abstinence to feelings of solace, comfort, escape from loneliness and feelings of shame and guilt.[3]

The Court noted that 90% of alcoholics in King County and Seattle, Washington, are not convicted of public drunkenness. It also observed that medical testimony by an internist indicated that defendant's physical health had benefitted from intermittent periods of confinement in the city jail. The Court concluded that the ordinance bore a rational relationship to acceptable public objectives and, further, did not violate the Eighth and Fourteenth Amendments to the United States Constitution, reaching conduct rather than mere status.[4]

Finally, the Court observed:

> "Obviously, the courts ought not invalidate legislation simply in the hope of compelling better legislation. Suppose this court, as a matter of public policy, were to strike down Seattle's ordinance prohibiting public drunkenness. What, then, are the alternatives? The courts levy no taxes, appropriate no moneys, employ no doctors, nurses, social workers and attendants, operate no hospitals, clinics, detoxification centers, and have no personnel or facilities under their direction for the care and treatment of chronic addictive alcoholics or for the protection of society from their misbehavior. Having created the vacuum, the courts are without means to refill it."[5]

There were two dissenting opinions, which urged the following of *Driver v. Hinant*.[6] The minority justices

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[3] Id.
[4] 435 P.2d at 698.
[5] 435 P.2d at 702.
[6] 356 F.2d 761 (C.A. 4, 1966).

failed to distinguish decisions of alcoholics to return to drinking after periods of abstinence from compulsion to return to drinking. They also relied, without critical analysis, on the assertion that chronic alcoholics were "diseased." The dissents offered no distinction between defendant choosing to drink and appear in public and the decisions of other types of recidivists to yield to motives to commit other kinds of additional crimes.

In the second decision, the United States Court of Appeals for the District of Columbia Circuit implicitly concedes many of the weaknesses of their insanity rule, essentially the constitutional standard urged upon this Court in the present case by appellant.[7] In *Washington v. United States,*[8] Chief Judge Bazelon in writing for the Court stated:

> "In *Durham v. United States,* we announced a new test for insanity: 'An accused is not criminally responsible if his unlawful act was the product of a mental disease or defect.' We intended to widen the range of expert testimony in order to enable the jury 'to consider all the information advanced by relevant scientific disciplines.'
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> "This purpose was not fully achieved, largely because many people thought *Durham* was only an attempt to identify a clearly defined category of persons—those classified as mentally ill by the medical profession—and excuse them from criminal responsibility. In fact the medical profession has no such clearly defined category, and the classifications it has developed for purposes of treatment, commitment, etc. may be inappropriate for

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[7] See our brief in chief at 19-22.

[8] —— F.2d ——, No. 20,232, Dec. 13, 1967.

ERRATUM

In the final two paragraphs of our brief in chief "Appellant" should be "Appellee."

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